No. 92-2038

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ASGROW SEED COMPANY,
Petitioner,

v.

DENNY WINTERBOER and BECKY WINTERBOER
d/b/a DEEBEES,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR JAMES G. McDONALD AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE

Amicus, James G. McDonald, a registered civil engineer and a registered geotechnical engineer, is a law student with a serious interest in intellectual property who intends to practice law in that specialty. *Amicus* was raised in northern Indiana amongst relatives with a long tradition of farming and by a father who was awarded more than a dozen patents, including several with agricultural applications. As a civil engineer with the United Nations, *amicus*' assignment in North Yemen allowed him to observe the importance to a farmer in a traditional agrarian society of saving seed, as he saw farmers carefully sorting the seeds of a crop into a large pile for consumption and a smaller pile for the next season's crop. Historically, failure to save seed means starvation.

Amicus supports neither party. *Amicus* believes that his unique combination of experience, knowledge, and intent give him an advantage in examining the statute. *Amicus* believes his brief would be of assistance to the Court in interpreting the statute and in evaluating whether the purposes of the statute are met.

SUMMARY OF ARGUMENT

When the critical phrases of § 2543 of the PVPA are examined, it is clear that the quantity of "such saved seed" is a certain quantity. This certain quantity is that amount needed to produce a crop equal in yield to the first crop. Additionally, since premiums can be collected for the full 18 year protected period, the intent of the act is met by the interpretation of the *amicus*.

ARGUMENT

A. The Federal Circuit erred in its interpretation of § 2543 of the Plant Variety Protection Act.

The first question presented is "[w]hether the Federal Circuit erred as a matter of law in holding that 7 U.S.C. § 2543 permits up to half a farmer's crop produced from a protected novel plant variety to be sold as seed in competition with the owner of the novel variety?" The question can be resolved if the term "such saved seed" in § 2543 can be defined as a precise quantity. Section 2543, "The Right to save seed; crop exemption," of the Plant Variety Protection Act ("PVPA"), 7 U.S.C. § 2321 *et seq.* (1988).

An examination of the § 2543 critical clause "use such saved seed in the production of a crop for use on his farm, or for sale as provided in this section" demonstrates that a specific quantity for a particular farmer can be precisely determined. A basic rule of statutory construction as articulated by the Court in *Diamond v. Diehr*, 450 U.S. 175, 182 (1981), dictates that words will be interpreted as taking their ordinary, contemporary, common meaning unless otherwise defined. In its second definition of the word "such," *Webster's New World Dictionary* (2nd college ed. 1978), defines "such" to mean "certain but not specified," a definition which supports the position that for a particular farmer the saved seed is a known quantity.

The critical definitional clause of the § 2543 uses parallel construction. The phrase as "in the production of a crop" is parallel to the phrase "for sale as provided in this section." Such parallel construction indicates that the two prepositional phrases are equivalent. The phrase dealing with the sale of seed is very general, while the phrase dealing with the production of a crop is more specific. Ordinary rules of statutory construction dictate that the specific govern the general. *Sutherland Statutory Construction* § 47.17 (5th ed. 1992). Therefore, "in the production of a crop" is the controlling phrase because it has greater specificity.

Examining the phrase "in the production of a crop," the first definition of the word "a" means "one." *Webster's*. Therefore, "a crop" means a single crop, not multiples of a crop. According to the third definition of "'crop" in *Webster's*, a "crop" signifies "the yield of any product in one season or place." "[C]rop exemption" in the title of § 2543 means an exemption for the *first* crop grown from the protected seed, as well as subsequent crops, as is made clear by the PVPA's legislative history. H.R. Rep. 91-1605, 91st Cong., 2nd Sess., *reprinted in* 1970 U.S.C.C.A.N. 5093. That first crop for an individual farmer is of known yield, produced during one season, and in one place. Terms in a statute should be used with the same meaning, therefore "crop" in the critical phrase must mean a crop equal in yield to the first crop.

It then follows that "such saved seed" means a quantity of seed specific to the farmer to yield such a crop. Since the two prepositional phrases are equal, with the more specific controlling the general, the quantity of seed that can be "for sale as provided in this section" is the same quantity as used to produce a crop equivalent in yield to the first crop, contrary to the result reached by the Federal Circuit.

The answer to the first question presented is that the Federal Circuit erred.

B. Contrary to the intent of Congress, the Federal Circuit's interpretation fails to give any encouragement for research.

The *amicus*' above-interpretation of the statute meets the intent of the PVPA as stated in § 2581: "It is the intent of Congress to provide the indicated protection for new varieties by exercise of any constitutional power needed for that end, so as *to afford adequate encouragement for research*, and for marketing when appropriate,

to yield the public the benefits of new varieties. Constitutional clauses 3 and 8 of Article 1, section 8 are both relied upon." (emphasis added).

The decision of the Federal Circuit does not satisfy the intent of the PVPA, as it allows farmers to sell amost half of each crop into the seed market. As a result of the Federal Circuit's interpretation, the owner/developer knows that he will have to recover all of his research and development costs during the first season of sale because he will face in following seasons innumerable competitors created from his first season's sales. The owner/developer of seed has one season to recoup his development costs, which is exactly the same amount of protection he would have received if the PVPA had never been enacted by Congress. The Federal Circuit has eviscerated the PVPA incentives for seed research and development. As a result, the public will not get the stable seed varieties intended by Congress.

The PVPA does not guarantee the recovery of research and development costs, but it does supply a legal monopoly over the sale of a protected seed variety for an 18 year period. This protection gives the prospective owner/developer information in calculating whether he will be able to recover his investment costs through premiums on the sale of the protected seed. The intent of the PVPA is met if the owner has the ability to collect a premium on every usage of the seed. It should be noted that allowing the farmer to save seed to create a second crop does not create a loss of premiums for the owner/developer. The owner/developer knows when selling—and the farmer knows when buying—that seed may be saved to grow a second crop and a subsequent crop each year. Each party will take that fact into account in determining the seed price acceptable to each. The owner/developer will include a premium in the price of the original seed for that second crop and for *each* subsequent "saved seed" crop.

Additionally, the importance of keeping seed within the protection of the PVPA is shown by a simple soybean seed example. Each soybean seed when planted produces 45 seeds. One pound of protected soybean seed which escapes the protecton of the PVPA, becomes by the end of the 18 year period of statutory protection, six septillion tons (or 12,000,000,000,000,000,000,000,000 pounds) of seed. This seemingly incomprehensible amount would all have been produced outside the control of the owner/developer, completely dwarfing his ownership interests and any opportunity to collect a deserved premium on his novel seed.

The *amicus*' interpretation allows the owner/developer to know that during the 18 year protected period, he will be able to collect a premium on all seed sold or saved, which will lead to the production of the stable seed varieties as intended by Congress in its passage of the PVPA. The interpretation of the *amicus* satisfies the intent of the PVPA in that it affords adequate encouragement for research.

CONCLUSION

For the reasons above, the case should be remanded to the Federal Circuit.

Respectfully submitted,

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